



<u>Decision Ref:</u>	2019-0060
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Personal Loan
<u>Conduct(s) complained of:</u>	Mis-selling (banking)
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint concerns a loan advanced to the Complainant in **2011** which the Complainant states he was pressurised into accepting by the Provider. The Complainant made this complaint to the Financial Services Ombudsman in November 2016.

The Complainant's Case

During 2011, the Complainant sought assistance from the Provider by way of finance to address his tax liabilities.

One of the loans that was sanctioned by the Provider was an advance of €8,000 on foot of facility letter dated **3 October 2011**.

The Complainant states that he did not want this loan, he did not ask for it, he was never in a position to repay it, and he was pressured by the Provider into taking it.

He states that this loan was suggested by an agent of the Provider, but he told her he did not want it as he could not afford to repay it. However, he states that the Provider's agent insisted that it was in his interest to take this loan, and he ultimately signed the application form due to the pressure that he felt under from the Provider's agent. He states that he had understood the loan was applied for, but it was his clear understanding that this loan was not to be drawn down. He states the loan proceeds were lodged into his account without his knowledge or consent.

He states that by the time he realised the funds had been lodged into his account, his situation had already become hopeless, as numerous monthly withdrawals of €1,058 had already been taken from his account.

He states that this €8,000 loan in 2011 (and the repayments on it) turned a bad situation into one which was then impossible.

The Complainant would like this loan written off with no adverse effect on his credit rating.

The Provider's Case

The Provider states that it advanced funds to the Complainant to assist him in meeting his revenue liabilities, and the Complainant requested and agreed to the €8,000 loan. The Provider says that the Complainant was not put under any undue pressure to agree to accept the loan. It notes the signed acceptance form for this facility dated **3 October 2011**, and it notes that during the period from October to December 2011 the Complainant wrote 43 cheques on his current account, as well as other direct debits and bills paid.

It states that during those three months (October to December 2011) only three agreed repayments were paid from the Complainant's current account towards the impugned loan.

It notes that in **February of 2012**, and on another two occasions thereafter, restructures were agreed and new credit agreements were entered into. It notes the Complainant has not honoured these agreements.

The Provider does not acknowledge or accept that it has engaged in any wrongful conduct.

The Complaint for Adjudication

The Complaint for Adjudication is that the Provider acted wrongfully in making loan facilities available to the Complainant in October 2011 in the sum of €8,000 on foot of loan application *****297.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

/Cont'd...

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on 12 February 2018, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

Following the consideration of an additional detailed submission from the Complainant, the final determination of this office is set out below.

The limitations of the jurisdiction of the Financial Services and Pensions Ombudsman should be borne in mind in complaints of this type. Where issues of sustainability / repayment capacity / debt restructure are in dispute, this office will not interfere with the commercial discretion of a provider unless the conduct complained of is unreasonable, unjust, or improperly discriminatory in its application to the Complainant, within the meaning of **Section 60(2)(c)** of the **Financial Services and Pensions Ombudsman Act, 2017**.

This complaint arises against the background of the Complainant's borrowings during 2011 onwards.

FEBRUARY 2011
Loan 1 (***260)**

A file note prepared by an agent of the Provider dated **14 February 2011** evidences a demand from the sheriff for €32,000 from the Complainant for arrears of tax. A schedule of projected income for the Complainant (in relation to his business) provided for some €16,720 to be received by the Complainant's business from debtors, by 21 March 2011. The Complainant's assets were set out on a separate sheet.

The Complainant entered into a loan agreement dated **17 February 2011** whereby the Provider advanced **€10,000**, repayable over 36 months (3 years) with monthly repayments of €306.31 to be made. The purpose of this loan was described as "Tax". This was loan account number *****260.

/Cont'd...

OCTOBER 2011

Loan 2 (***427)**

The Complainant entered into a loan agreement dated **3 October 2011** whereby the Provider advanced **€25,000**, repayable over 84 months (7 years) with monthly repayments of €368.13 to be made. The purpose of this loan was described as "*Debt Consolidation*". This was loan account *****427

This loan was drawn down on 6 October 2011, and the funds were lodged into the Complainant's current account *****187.

The Special Conditions of this loan were specified in capitals at the bottom of the first page as follows:-

1. *LOAN ACCOUNT [*****260] TO BE CLOSED ON DRAWDOWN.*
2. *ACCOUNTANT TO CONFIRM WITHIN ONE MONTH & IN WRITING THAT ALL REVENUE AFFAIRS HAVE BEEN BROUGHT UP TO DATE FOR CLIENT.*
3. *DRAFT PAYMENT TO BE MADE ON DRAWDOWN FOR CLEARANCE OF FACILITIES HELD WITH [ANOTHER FINANCIAL SERVICE PROVIDER] AGAINST STATEMENT CONFIRMING CLOSING BALANCE ON FACILITY.*
4. *CURRENT ACCOUNT [*****015] TO BE IN ORDER PRIOR TO DRAWDOWN.*
5. *FULL REVIEW TO BE COMPLETED IN 12 MONTHS TIME."*

Between 3 October 2011 and 9 January 2012 three repayments of €368.13 were made to Loan 2 (€1,104.39 in total). A further repayment of €368.13 was made to this account on 10 January 2012.

Loan 3 (***344)** (This is the loan in respect of which the Complainant has made the complaint, referring to account number *****297, but in fact this appears to be the loan application reference number only.)

On **3 October 2011**, the Complainant signed and accepted another loan offer of **€8,000**, specified to be repayable over 13 months with monthly repayments of €689.99 to be made. This is the loan that the Complainant states in his complaint that he was forced to accept by reason of the pressure applied to him by the Provider.

The purpose of this loan was described as "*Tax*". This was loan account number *****344.

The Special Conditions of this loan identified only one such condition as follows:-

1. *ACCOUNTANT TO CONFIRM WITHIN ONE MONTH & IN WRITING THAT ALL REVENUE AFFAIRS HAVE BEEN BROUGHT UP TO DATE FOR CLIENT."*

/Cont'd...

Restructures

I note that Loan 1 was to be discharged by the proceeds of Loan 2 in October 2011. Thereafter, on **6 January 2012** the Complainant contacted the Provider by telephone to say that he could not afford the repayments for the loans. Later that month, on **25 January 2012**, Loan 2 was restructured together with Loan 3 with a new loan facility in the sum of €30,195 repayable over 84 months (7 years) with monthly repayments of €453.71 from 10 February 2012 onwards.

By letter dated **3 April 2012** the Complainant wrote to the Provider explaining his very poor financial circumstances involving the cessation of his wife's business and also the absence of any bookings for his own business in the previous 6 month period from October 2011. The Complainant was clearly in very difficult financial circumstances at that time and understandably expressed concern for his 2 children. He explained that he would be unable to meet loan repayments for the foreseeable future and he asked for a 12 month moratorium on repayments.

I note that on **31 October 2012** a further restructuring agreement was entered into for the total borrowing of €29,284.00 repayable over 84 months (7 years) in a manner which facilitated *"11 consecutive monthly payments of EUR 158.50 towards interest commencing on 29 October 2012 followed by 72 consecutive monthly payments of EUR 493.00"*.

Analysis

The Provider has furnished an account of the basis for each loan and the information furnished by the Complainant when applying for those loans. A recurring theme is that the Complainant was having difficulty bringing his tax affairs up to date, and that he expected income from his businesses to be forthcoming in the near future to assist his financial position and to help clear the loans.

The combination of the Complainant's monthly repayments for Loans 2 and 3 amounted to €1,058.12 from October 2011. The offer and acceptance documents for each loan are nearly identical. They both begin with the sentence:

"I am pleased to inform you that the Bank has sanctioned the facility as set out below"

and the Complainant signed under the sentence

"The terms and conditions applicable to the facility in this letter of sanction are accepted by me/us".

All loan offers referred to above, have been signed by the Complainant, by way of acceptance, but the Complainant says that he was induced to accept Loan 3 by reason of the undue influence of the Provider, or by reason of duress applied by it to restructure his borrowings. He says that this loan *"was not needed or wanted, but instead – forced upon me by [the Provider]"*.

/Cont'd...

An allegation of undue influence or duress requires evidence to the effect that the person in question, i.e. in this instance, the Complainant, did not have the capacity to make his own decisions. The evidence available does not suggest this position. The Complainant, in this instance, is a businessman and although he was in difficulty during the relevant period, and under considerable financial pressure, this in itself does not mean that the Provider placed him under duress. Whilst he was having problems meeting his financial obligations (primarily, arrears of tax) I do not accept that the situation was one of the Provider's making.

The Complainant says that his ability to make his own decisions was significantly affected by the pressure he was under in struggling to run a business, make repayments on Loan 1 and the ever-present threat of action by the Sheriff which had shaken his peace of mind and left him feeling overwhelmed, burdened by debt and with no solution in sight. He says that *"I made my wishes very clear at the time that this money was under no circumstances to be made available to me"* until he required the monies to *"pay tax bills which would occur a year from then"*.

Although the Complainant says that he did not wish to have access to the funds made available by Loan 3, I note that in addition to the sum of €25,000 drawn down from Loan 2 which was lodged to his current account (*****187) on 6 October 2011, the full facility of €8,000 available pursuant to Loan 3 was also drawn down on the following day and lodged to the same current account.

It is also clear that the loan agreement itself dated 3 October 2011 signed by the Complainant, anticipated repayments commencing the following month on 7 November 2011 in the sum of €689.99; such repayments would not have been planned for if the funds were not intended to be drawn down immediately.

The Provider in responding to the complaint has indeed referred to 43 separate cheques drawn on the current account over the next number of months and indeed to a number of direct debits for utilities and other bills debited within the same period, using those funds.

The acceptance portion of the Letter of Loan Offer for Loan 3 is duly signed. There is no suggestion that the Complainant did not sign it. Whilst the Complainant says that he did not want access to those funds immediately, he nevertheless disbursed the funds he received. I do not accept that by the time he states he realised he had received the funds from Loan 3 (at the beginning of 2012) it was too late for him to do anything about it, because of the level of repayments that had already been debited from his account. I believe that given the financial situation experienced by the Complainant from early 2011 onwards, the Complainant is likely to have been, or certainly should have been particularly conscious of his current account balance at all times during the relevant period.

I note that the Provider consistently agreed to restructure the loans based on the information the Complainant was giving it. It is notable in this regard that the Complainant's letter of **3 April 2012** makes no mention of any unwanted loan. Subsequent to that letter the repayments were restructured over a longer period of time, in ease of the Complainant's position.

/Cont'd...

Repayment of the loans advanced by the Provider was largely contingent on the Complainant's contention that his business was due to pick up and funds brought in from that business would cover repayments. Unfortunately, it seems that this pick up in business did not materialise in the way the Complainant had anticipated. It appears that the Provider did what it could to try to assist the Complainant through difficult times with finance. The fact that the Complainant has been unable to make the repayments due, is regrettable, but this in itself does not constitute a ground on which to invalidate the loan agreement.

This complaint is that the Provider wrongfully advanced credit to the Complainant, because it should have known he could not pay it back. Ultimately, the assessment of the risk associated with advancing funds, and the decision to advance those funds, and the repayment terms offered, are matters within the commercial discretion of a provider. The Complainant received the loan funds, and disbursed them. Subsequently the Provider agreed numerous restructures.

On the basis of the evidence before me, I am not satisfied that there are any grounds upon which it would be reasonable to find that the loan was not a valid one, or that the Provider acted wrongfully in making available the facilities requested by the Complainant.

Accordingly, whilst one must have every sympathy for the Complainant, for the situation in which he found himself, nevertheless on the basis of the evidence available, I take the view that this complaint cannot be upheld.

Conclusion

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is rejected.

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.

MARYROSE MCGOVERN
DIRECTOR OF INVESTIGATION, ADJUDICATION AND LEGAL SERVICES

22 March 2019

/Cont'd...

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

(a) ensures that—

(i) a complainant shall not be identified by name, address or otherwise,

(ii) a provider shall not be identified by name or address,

and

(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.

